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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1122

FRED A. BROWN, ET AL., D/B/A GEM DAIRY, PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 55) is reported at 367 F. 2d 907. The district court's opinion (R. 67) [1] is reported at 23 A.D. 1323.[2] An earlier opinion of the court of appeals, affirming the district court's denial of preliminary injunctive relief, is reported at 331 F. 2d 362. The district court's

[1] "R." refers to the separately bound Transcript of Record in the court of appeals; copies have been filed with this Court.

[2] "A.D." stands for "Agriculture Decisions," the official publication of the Department of Agriculture containing all judicial and administrative decisions issued under regulatory laws administered by that Department.

opinions on that matter are reported at 211 F. Supp. 953 and 217 F. Supp. 285.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966 (Pet. App. 55). A timely petition for rehearing was denied on December 6, 1966. The petition for a writ of certiorari was filed on March 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, and Milk Marketing Order No. 137, 7 C.F.R. part 1137, are printed in the Appendix, *infra*, pp. 13–15.

QUESTIONS PRESENTED

After an administrative hearing pursuant to 7 U.S.C. 608c(15)(A), the Judicial Officer of the Department of Agriculture—acting for the Secretary—determined that petitioners were not dairy farmers marketing their own farm's milk production and therefore did not come within the "producer-handler" exemption from milk marketing regulation contained in Federal Milk Marketing Order No. 137, 7 C.F.R. part 1137. The following questions are presented:

1. Whether, as both courts below held, this determination was supported by substantial evidence.

2. Whether the failure to accord petitioners the exemption was, in the circumstances, a confiscation of their property.

3. Whether the administrative proceedings met the requirements of due process of law.

4. Whether the government was entitled to injunctive relief.

STATEMENT

1. BACKGROUND

Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, the Secretary of Agriculture promulgated an order, effective November 1961, regulating the marketing of milk in certain areas of the State of Colorado. Under this order (Milk Marketing Order No. 137, 26 F.R. 9122, as amended, 7 C.F.R. part 1137), dairy companies ("handlers") selling fluid milk in the "Eastern Colorado Marketing Area" must pay specified minimum prices for all their raw milk supplies purchased from farmers ("producers").[3]

The Secretary exempted from minimum price regulation under Milk Marketing Order No. 137 the relatively few farmers who market their own milk in the Eastern Colorado Marketing Area. 7 C.F.R. § 1137.60. Such a farmer (a "producer-handler"), is defined in the order as one who "operates a dairy farm" and does not sell milk purchased from other farmers in his milk-marketing operations. 7 C.F.R. § 1137.11.[4] The order specifies, however, that farmers claiming

[3] For practical regulatory reasons, not questioned here, the minimum price payments are channeled through a "producer settlement fund", the mechanics of which have been explained and approved generally by this Court in cases involving similar milk marketing orders. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533; *H. P. Hood & Sons* v. *United States*, 307 U.S. 588.

[4] A "producer-handler" may, however, market milk acquired from "pool plants"—*i.e.*, from companies which have already paid the minimum prices for their raw milk supplies. 7 C.F.R. § 1137.11.

exemption from regulation as producer-handlers must "provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary to produce the entire volume of fluid milk products * * * and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person." 7 C.F.R. 1137.11.

2. PETITIONERS' OPERATIONS

Petitioners operate Gem Dairy, a milk company in Denver, Colorado, which sells milk in the Eastern Colorado Marketing Area. In May 1961, after the substance of Milk Marketing Order No. 137 had been made public but before the order was made effective, petitioners entered into a series of contracts with the dairy farmers supplying them with raw milk.[5] Under the terms of those contracts, the dairy farmers purport to convey to petitioners—in consideration of $15.00 per animal—an "undivided one-tenth interest" in each of the cows in their herds. The contracts specify that the cattle are to remain in the custody of the selling farmers, who are to continue to "pay all costs of care, feeding, and maintenance of the said cattle," but that "[a]ll milk produced by the said cows * * * shall be the sole and exclusive property of [petitioners]" (R. 189). Petitioners are required to reimburse the farmers for the expense of maintaining the cattle, the reimbursement to be measured by the amount of milk produced by the herds and paid for at the going price for butterfat contained in that

[5] A representative contract appears at R. 188–190.

milk (R. 190). The contracts are voidable on thirty days' notice at the option of either petitioners or the farmers, in which event petitioners are absolutely entitled to be refunded the $15.00 per cow that they had paid (R. 190).

3. THE PROCEEDINGS BELOW

After the Eastern Colorado Milk Marketing Order became effective, petitioners declined to make the payments required of them into the producer settlement fund (see, p. 3, n. 3, *supra*), although they marketed most of the milk within the marketing area. The United States then brought an action against petitioners, under 7 U.S.C. 608a(6), to enforce petitioners' compliance with the marketing order. The principal defense was that petitioners were exempt from regulation under the order because they were marketing their own milk.

The district court, declining to grant the government's application for preliminary injunctive relief, stayed the enforcement proceeding to give petitioners an opportunity to obtain a determination of their claim to be exempt from regulation in an administrative proceeding before the Secretary under 7 U.S.C. 608c(15)(A). *United States* v. *Brown*, 211 F. Supp. 953, 217 F. Supp. 285 (D. Colo.), affirmed, 331 F. 2d 362 (C.A. 10).

After an administrative hearing at which petitioners were given an opportunity to present evidence to establish that Milk Marketing Order No. 137 did not apply to their operations, the Department of Agriculture's Judicial Officer (acting for the Secre-

tary) ruled that petitioners' contractual arrangements with their suppliers did not qualify them as "producer-handlers" under 7 C.F.R. § 1137.11, because they did not operate their own dairy farms and did not assume the risk of the farming operation, as the regulation contemplated. The Judicial Officer also rejected petitioners' contention that they were entitled to have the Secretary rule personally on their claim. *In re Fred A. Brown et al.*, 23 A.D. 18 (R. 192–210), rehearing denied, 23 A.D. 287 (R. 213).

Petitioners sought judicial review of the administrative decision in the district court as authorized by 7 U.S.C. 608c(15)(B), and the review action was considered jointly by that court with the government's pending suit against petitioners to enforce the marketing order. On November 13, 1964, the district court upheld the administrative decision as supported by substantial evidence, ruled that the Secretary was authorized to delegate the hearing and determination of the administrative proceedings in question to the Judicial Officer, and awarded judgment to the United States for $13,066.39, representing petitioners' overdue obligations to the producer settlement fund under the marketing order. The district court denied, however, the government's request for an injunction directing petitioners to comply with the marketing order in the future. *United States* v. *Fred A. Brown*, 23 A.D. 1323 (D. Colo.) (R. 67–76).

On cross-appeals to the United States Court of Appeals for the Tenth Circuit, the district court was affirmed insofar as it had upheld the administrative

decision and awarded a money judgment to the government (Pet. App. 55), but reversed insofar as it had denied injunctive relief. The court of appeals, in remanding the case with instructions to grant that relief, observed (367 F. 2d at 912–913, Pet. App. 64):

> The success of the plan of the Order depends upon the prompt compliance of those subject to its provisions, including prompt payment of the financial obligations. Gem has never made any payments into the stabilization fund, and, without enforcement relief, the Secretary can only sue periodically to recover delinquent payments, thereby disrupting the entire plan. We think the statute clearly contemplates that the Secretary is entitled to an injunction commanding compliance with the Order by one who has been in continuous violation. * * *

On December 6, 1966, the Tenth Circuit denied petitioners' application for rehearing *en banc*.

ARGUMENT

The decision below is plainly correct and raises no issue of general importance. Further review is not warranted.

This Court has sustained milk marketing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 corresponding in all essentials to the Eastern Colorado Marketing Order here questioned. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533; *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. It is likewise clear that the Act vests the Secretary with authority to regulate the marketing of all milk, including that distributed directly by individual dairy farmers. *Freeman* v. *Vance*,

319 F. 2d 841, rehearing denied, 325 F. 2d 663 (C.A. 5), certiorari denied, 377 U.S. 930; *Ideal Farms, Inc.* v. *Benson,* 288 F. 2d 608 (C.A. 3), certiorari denied, 372 U.S. 965. However, in the present case the Secretary elected not to regulate milk marketed directly by farmers because of the relative insignificance of such operations in the Eastern Colorado Milk Marketing Area. The issue is whether petitioners' milk marketing operations qualified them as "producer-handlers" and thus entitled them to exemption from regulation under Marketing Order No. 137.

1. After an administrative hearing, the Secretary ruled that petitioners were not exempted by the terms of the order. Both courts below agreed that the Secretary's determination was supported by substantial evidence in the administrative record, which established that, despite their contractual arrangements with the farmers, petitioners did not really operate their own dairy farms at their own risk as the order required to be exempted from coverage. 7 C.F.R. 1137.11. Not only is this ruling plainly sound, but a contrary conclusion would permit other milk companies, with no real risk or change in their actual operations, to circumvent regulation by adopting similar arrangements. This would defeat one of the cardinal objects of the legislation—assuring the receipt by dairy farmers of minimum prices for their milk. 7 U.S.C. 602. As the court of appeals noted (Pet. App. 60, n. 3), a strikingly similar effort to avoid regulation under the Act had been attempted—and rejected—in the past. *Elm Spring Farm* v. *United States,* 127 F. 2d 920 (C.A. 1). See, also, *Cosgrove* v. *Wickard,* 49 F. Supp. 232 (D. Mass.).

2. The foregoing largely answers petitioners' argument from *Lehigh Valley Coop.* v. *United States,* 370 U.S. 76. The issue in that case was quite different—whether the Secretary could require milk companies, not otherwise regulated by a milk marketing order, to make "compensatory payments" into the producer settlement fund as a condition of their doing business in a regulated marketing area. No question of compensatory payments or discrimination against "outside" milk companies is involved in the instant case; the only substantive issue is whether petitioners can escape regulations equally applicable to all their competitors in the Eastern Colorado Milk Marketing Area on the contention that they are really "producer-handlers," *i.e.,* farmers marketing their own supplies. Both *Lehigh Valley* and *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2) (also cited by petitioners), recognize that a handler doing business in a marketing area may be subjected to milk pooling, minimum pricing and other regulatory provisions equally applicable to all milk companies competing in the market. See 370 U.S. at 78–81; 196 F. 2d at 793.

3. There is no substance to petitioners' contention that they were denied procedural due process. Petitioners were afforded full opportunity in the administrative proceedings before the Department of Agriculture's Judicial Officer to establish that they came within the producer-handler exemption in Marketing Order No. 137, and, as the record developed in the proceeding demonstrates, they took full advantage of that opportunity (see R. 101–213). This procedure—an administrative hearing subject to judicial review

on the administrative record—is the one specified by the Act, 7 U.S.C. 608c(15) (A) and (B), and approved by this Court in *United States* v. *Ruzicka*, 329 U.S. 287. Accord: *United States* v. *Mills*, 315 F. 2d 828, 836 (C.A. 4), certiorari denied *sub nom. Willow Farms Dairy* v. *Freeman*, 374 U.S. 832. And, as *Ruzicka* makes clear, the Act authorizes judicial enforcement of marketing orders prior to or pending the completion of administrative proceedings and specifically vests the district courts with injunctive and mandamus jurisdiction to that end. See 329 U.S. at 293–294; 7 U.S.C. 608a(6) and 608c(15)(B); *United States* v. *Yadkin Valley Dairy Cooperative, Inc.*, 209 F. Supp. 634 (M.D. N. Car.), affirmed, 315 F. 2d 867 (C.A. 4); *United States* v. *Turner Dairy Co.*, 162 F. 2d 425 (C.A. 7), certiorari denied, 332 U.S. 836; *Crull* v. *Wickard*, 137 F. 2d 406 (C.A. 6); *United States* v. *Adler's Creamery*, 110 F. 2d 482 (C.A. 2), certiorari denied, 311 U.S. 657.

Nor is there merit to petitioners' contention, based on the first two *Morgan* cases,* that they were entitled to a personal ruling by the Secretary of Agriculture in the administrative proceeding. In a statute enacted after those decisions, Congress expressly authorized the Secretary to delegate to other officials in his Department regulatory functions of this nature. Act of April 4, 1940, §§ 1–3, 54 Stat. 81–82, as amended, 5 U.S.C. 516a, 516b, 516c. See H. Conf. Rep. No. 1808, 76th Cong., 3d

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* *Morgan* v. *United States*, 304 U.S. 1, and *Morgan* v. *United States*, 298 U.S. 468. Those cases arose under the Packers and Stockyards Act, 42 Stat. 159, and do not deal with the procedures under the Agricultural Marketing Agreement Act of 1937 with which this case is concerned.

Sess. Authority to hear and determine administrative proceedings under 7 U.S.C. 608c(15)(A) has been duly transferred to the Judicial Officer of the Department of Agriculture (10 F.R. 13769; 26 F.R. 11256; 27 F.R. 8288; see, also 7 C.F.R. § 1137.3), who validly exercised them here (R. 210). This Court and others have frequently recognized that delegation.[7]

4. Petitioners contend that the Tenth Circuit's two decisions in the course of these proceedings are inconsistent in their treatment of the government's entitlement to injunctive relief. There is no conflict; petitioners have overlooked the distinction between preliminary and final injunctive relief. As the court of appeals itself recognized in its second decision (367 F. 2d at 913, n. 4; Pet. App. 64), its initial ruling (331 F. 2d 362) had been addressed to the question whether the Agricultural Marketing Agreement Act entitled the government to injunctive relief as a matter of right *before* petitioners' administrative proceedings had been completed. This question is entirely distinct from the one decided in the second appeal: whether permanent injunctive relief directing petitioners to comply with the Marketing Order was warranted under the Act *after* the Secretary's rejection of petitioners' claims was upheld on judicial review. See *United States* v. *Ruzicka, supra,* 329 U.S. at 295–296. For the reasons stated by the court of

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[7] *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 77, n. 1; *Denver Stock Yard* v. *Livestock Ass'n*, 356 U.S. 282, 285, n. 2; *Wilson & Company* v. *Benson*, 286 F. 2d 891, 892, n. 1 (C.A. 7); *Central Fruit and Vegetable Co.* v. *Crane*, 198 F. 2d 808 (C.A. 9), certiorari denied, 344 U.S. 921.

appeals (Statement, *supra*, p. 7; Pet. App. 64), it is plain that such relief, which the statute authorizes (7 U.S.C. 608a(6); App., *infra*, p. 13), was fully warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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MAY 1967.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part:

7 U.S.C. 608a(6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of

process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shal lnot impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

Milk Marketing Order No. 137, 7 C.F.R. part 1137, provides in pertinent part:

§ 1137.3 *Secretary.*

"Secretary" means the Secretary of Agriculture of the United States or any officer or employee of the United States authorized to exercise the powers and to perform the duties of the Secretary of Agriculture.

§ 1137.11 *Producer-handler.*

"Producer-handler" means any person who operates a dairy farm and a milk processing plant which distributes fluid milk products on routes in the marketing area and who receives no fluid milk products during the month from dairy farmers or any other source except by transfer from a pool plant. Such person must provide proof satisfactory to the market administrator that the care and management of all the dairy animals and other resources necessary

to produce the entire volume of fluid milk products (excluding transfers from pool plants) and the operation of the processing and distribution business is the personal enterprise of and at the personal risk of such person.

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